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Iredell Jenkins*

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Abstract

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KEYWORDS: threat, ends, means

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I agree, of course, with the thrust of Professor Miller's paper and with the conclusion at which he arrives. There can be no question that nuclear weapons pose a threat not only to civilization and to all human beings, but even to the life process itself. It follows, then, that the proliferation of such weapons contravenes the fundamental principles of morality, the accepted rules of international law, and any sane idea of national interest and policy. Furthermore, I think that Professor Miller's five arguments make out a cogent case for his conclusion that "the manufacture, deployment, and possible — even probable — use of nuclear weapons contravene the Constitution".[1] Each of these arguments is closely reasoned and well supported; together they present a persuasive defense of his claim, which might on its face appear unreasonable to the point of absurdity.

One may be tempted to object that the time-honored doctrine of *raison d'etat* makes these arguments and this conclusion meaningless: for this doctrine holds that any state is justified in taking—and is certainly going to take—whatever steps it deems necessary for its own protection. However, this argument fails for the simple reason that when several states possess significant numbers of nuclear weapons, then their use by any one state would quite surely lead to retaliation and hence to its own destruction. And this goes directly against the purpose of *raison d'etat,* which is to guarantee the existence of the society of which the state is the agent.

Consequently, and as a point of departure for this response, I am prepared to stipulate Professor Miller's conclusion that "those who wield both formal authority and effective control in the American constitutional order have a duty to take action designed to eliminate the nuclear threat throughout the world" and that "the duty . . . is of con-

* Professor Emeritus of Philosophy, University of Alabama.

1. Miller, *Nuclear Weapons and the Constitution,* 7 NOVA L.J. 21, 23 (1982).

stitutional dimension."[2] However, despite all of this, I fear that the conclusion itself will be inconsequential because it has no precise and positive content. Stated more explicitly, the nature of this "constitutional duty" is both unspecified and devoid of sanctions; it does not impose any clearly defined obligations, either positive or negative, upon those to whom it is addressed; and it does not suggest any ways in which these "obligations" could be enforced and derelictions therefrom punished. This judgment must be qualified by pointing out, as Professor Miller stresses, that this essay is a "preliminary inquiry," not a "full-dress exposition."[3] Its purpose is to raise an issue rather than settle it, and so to initiate a cooperative discussion of legal (constitutional) procedures as a possible means to control the deployment and use of nuclear weapons. A final judgment, therefore, must be held in abeyance; but as the case now stands, I fear that however admirable the end sought, the means proposed will prove ineffective.

The argument that supports this judgment stands on three legs. Each of these is itself based upon a contention or concession that is central to Professor Miller's case and essential to its understanding and evaluation. My purpose in developing this argument is to indicate the difficulties I perceive in his position and thus to contribute as best I can to the discussion he seeks. He has made an admirably provocative start, and the undertaking is eminently worthwhile.

I take my first step with Professor Miller's statement that his paper "is emphatically not a plea for unilateral disarmament. We live in a Hobbesian world, a condition that is not at all likely to change."[4] Since the nations of the world have rejected the irenic precept of live and let live, adopting instead a policy of dog eat dog, the international climate is poisoned by mistrust and fear. Given this atmosphere, any suggestion of unilateral disarmament would be tantamount to putting one's self at the mercy of one's enemies. If nuclear disarmament is to be safe and acceptable, it must be mutual, with every nation disposing of its entire arsenal: "every weapon of mass destruction in the world"[5] must be eliminated. This is the outcome that the Constitution is held to

2. *Id.* at 24.
3. *Id.* at 23.
4. *Id.* at 24.
5. *Id.*

require. This is made quite explicit in the passage quoted earlier, where it is stated that the "constitutional duty" imposed on the government is "to take action designed to eliminate the nuclear threat *throughout the world*"[6] (Emphasis added). Since nuclear weapons anywhere clearly pose a threat to our lives, liberties, and properties, we, as American citizens, have a right to be free of them, and the government has the duty to see that we are.

Standing by itself, this contention appears self-evident. If the government owes us protection against arbitrary search and seizure, double jeopardy, self-incrimination, and cruel and unusual punishment — not to mention such benefits as clean air, pure water, adequate diet, and proper health care — then it would certainly seem to owe us protection against instant immolation. Therefore one is inclined to take this first step without hesitation.

This brings me to my second step. Here I take as my text Professor Miller's statement on page 23: "At the outset, I readily concede the jurisprudential problem of whether legal norms (rights) can exist absent a means of enforcement". It is, or course, traditional doctrine that a right accorded to some is barren without a corresponding duty imposed on others. It is further recognized that both the right and the duty are bootless unless there are sanctions to enforce the latter and make good the former. It is difficult to see just what legal (constitutional) means are available to secure to the people this right to the worldwide elimination of nuclear weapons. If the Supreme Court were to issue orders to this effect, how is it to enforce them against this government, let alone the governments of other sovereign states?

To this objection, Professor Miller offers two rebuttals, both sound in principle. He first points out that there are both constitutional and legislative duties that cannot be judicially enforced or for the neglect of which no penalty is even provided.[7] Secondly, he reminds us that the law is instrumental and living, and that the courts are continually recognizing new rights and creating new duties as the occasion seems (to them) to require. These points are well taken, but I do not think they are applicable in the present context. When the courts accord rights to privacy, abortion, racial integration, and so forth, they impose duties

6. *Id.* at 24 (emphasis added).
7. *Id.* at 23.

that are at least within the claimed and granted (albeit reluctantly) jurisdiction of the federal government, and to enforce these rights they can create sanctions, however ineffective and difficult to enforce they may be. But when the courts recognize the right of American citizens to the elimination of *all* nuclear weapons *everywhere,* they impose duties that are altogether beyond both the legal jurisdiction and the practical reach of the federal government. For the courts now tell the government of this country to achieve certain outcomes in other countries whose governments recognize no authority superior to themselves and which command power commensurate with that of this country. Without a common sovereign which holds both ultimate authority and a monopoly of power, rights and duties become mere words. The gist of the matter is this: the writ of the federal courts simply does not run in other sovereign states.

I now take my third step, which raises the most concrete and practical issues. This is again based on the passage previously cited from page 23 and also on another passage of similar import with which professor Miller summarizes his argument. The latter runs as follows:

> "My suggestion is that Supreme Court Justices should grasp the nettle and point out to the Executive and the Congress that officials in those branches are charged with a constitutional duty to take action to eliminate threats to the lives, liberties, and properties of the citizenry. Those threats emanate from nuclear weaponry."[8]

In both of these passages, it is the phrase "take action" that I want to emphasize: the government is to be told that it has a "constitutional duty" to "take action" to "eliminate the nuclear threat throughout the world." Even if we grant that the Supreme Court should in principle and does in fact issue orders to this effect, the critical question remains: *What action?*

Precisely what actions are the Executive and the Congress to be ordered to take? A duty which is hopelessly vague or with which compliance is impossible to determine is as empty as one that is unenforceable. And simply to order "action" would be the epitome of vagueness: the government could claim compliance on the basis of virtually any effort whatever; or it could refuse to disclose the "actions" it had taken,

8. *Id.* at 35.

justifying its refusal by invoking the sacred cow of the "national security". One could answer this objection by arguing that the Supreme Court decision mandating this new duty would be similar to that in the 1954 school desegregation opinion: the Court would simply order the President and the Congress to take steps to effect universal nuclear disarmament "with all deliberate speed".[9] The specifics of this mandate would then be left to be worked out in a series of suits and rulings.

But I do not believe that this argument would stand up. Mutual nuclear disarmament by numerous sovereign states is obviously a matter of foreign policy; and the conduct of foreign policy is, by the Constitution itself, conferred on the President with the advice and consent of the Senate. What actions this country could and should take in this area are matters of high policy, involving diplomatic, political, military, and economic dimensions: intelligent decisions require wide experience, vast amounts of detailed information, and the cooperation of experts from numerous esoteric fields. It seems doubtful if even those omniscient legal deities, the Justices of the United States Supreme Court, could muster the data and acquire the familarity that would be needed to issue reasonable and effective orders regarding nuclear disarmament. The Court could, of course, solicit *amicus* briefs from innumerable experts; and they could subpoena witnesses and documents from the several executive departments. But much of this information is strictly classified, hardly suitable to be aired in legal briefs, open hearings, and the Supreme Court reports; and the advice that the Justices would receive would certainly be so diverse and contradictory that they would, in the last analysis, have to rely upon their own judgment, untrained as that is in this field. Even if all of these hurdles could be surmounted, it is difficult to see what "action" the Court could order. In negotiating the reduction of nuclear weapons with other sovereign states, there are only two procedures this government can employ: it can threaten and it can deal. And that is precisely what every President for at least the past thirty years has been doing.

There are two further issues that should be considered briefly. The first concerns Professor Miller's alternative proposal that the "first-strike use of nuclear weapons should . . . be dropped as a policy op-

9. Brown v. Bd. of Educ., 347 U.S. 483 (1954).

tion."[10] This is a more moderate suggestion. And it is an "action" that the Supreme Court could easily order, since it is simple and specific—enforcing the order, however, would be another matter. But quite apart from the wisdom and practicality of such a step, I fear that it would prove ineffective as an instrument of peace and ineffective as an inducement to other states to take similar action, for the government that adopted such a policy of renunciation could not bind future governments. The state is an enduring entity; but circumstances change, and so do governments and their perceptions of these circumstances. Consequently, the announcement of such a policy would have little meaning or impact. It would offer no lasting guarantee to the society that adopted it and even less to other states and their governments.

The second of these issues concerns the idea—suggested but not developed in Professor Miller's paper—that a Supreme Court decision condemning nuclear weapons on constitutional grounds and mandating action to effect their worldwide elimination would have great moral force and persuasive power. Even if the Court could not enforce such an order or specify its meaning, its mere announcement might serve to make the public more conscious of the terrible dangers and the ultimate evils inherent in the proliferation of nuclear arms. This is a possibility that should not be dismissed lightly. There is not the slightest doubt that past Supreme Court decisions have had just such an impact on this society, and even on the international order: one thinks particularly of decisions on racial integration, the equality of women, access to the political process, and human rights in general.

However, I do have serious doubts, based on two grounds, whether a Supreme Court ruling on nuclear weapons would have a similar impact. One of these grounds concerns the context of such a ruling. Intense suspicion of Russian policy and intentions, and hence an obsessive fear of Russia gaining nuclear superiority, are endemic in this country. Given this atmosphere, any such Court ruling would almost certainly be interpreted as mandating unilateral disarmament; so it would be greeted with outrage and dismissed with contempt.

The other ground of my doubts concerns the present public standing of the Supreme Court, for I do not think that the Court now enjoys anything like the respect and moral authority that it once did. The

10. Miller, *supra* note 1, at 30.

mystique of the Court—the sense that it was somehow above the political process, untainted by ordinary human passions, and immune to outside pressures—has been largely stripped from it. Once the Supreme Court was thought to be concerned only with the Eternal Law writ large in the Constitution, and the Justices were seen as moved only by constitutional considerations. But now we are only too aware that the Court is concerned with the same social issues that occupy us; and we have learned that the justices are as much influenced by their biases and personal backgrounds as the rest of us.

This shift in view is due partly to the greatly enhanced publicity accorded the Court, and to an increasing public cynicism regarding all institutions. It is also due very largely to the extreme activism of the Supreme Court in recent decades. The Court has intervened in so many moral and social questions that touch people deeply, and it has issued decisions that have aroused such resentment, that it is now widely regarded not as a pure servant of the law, but rather as the tool of special interests, especially those of an ultra-"liberal" persuasion. The Supreme Court and the federal judiciary have been extremely courageous in intervening to correct social ills that had been neglected and ignored by all of the governmental authorities that bore responsibility for them. But this fact does not lessen the resentment and mistrust that have been directed against the Supreme Court.

Be all this as it may, I doubt if a Supreme Court ruling on nuclear disarmament would have any significant moral force or persuasive power. When survival is thought to be in question, even the strongest moral voice falls on deaf ears, and even the most perfect argument fails to assuage fear.

Professor Miller made it very clear that he wanted his respondents to offer criticisms and suggestions that could fuel a further dialogue. I have certainly offered criticisms, though suggestions, alas, have been sadly lacking. But I would not wish to close on this negative note, for I think Professor Miller's proposal could be extremely important: whether it will be, only the ensuing dialogue can tell.

If we are to consider Professor Miller's paper at all sanely and sympathetically, we must take seriously the quotations from A. N. Whitehead with which he introduces his proposal; these set the necessary tone for his suggestion. It is precisely our fundamental and unquestioned assumptions that most need to be brought into the open and re-examined. And when some hardy soul does this, and proposes fresh

ideas, these are apt to appear patently absurd. And so it is with this idea that nuclear weapons pose a constitutional issue to which lawyers and the courts should address themselves. It has long been assumed that the conduct of foreign policy and the care and nurture of the national security were to be left to the President and his military and diplomatic advisors. The Congress was held to have very little business meddling in these matters, and the federal courts to have none at all: these latter need only recognize that treaties duly ratified were part of the law of the land.

That is no longer a safe assumption. Professor Miller's view that judges are "timorous creatures" who "look upon requests to go beyond the familiar and the expected as frightful occasions"[11] may be sound as a general proposition. But it seems clearly not applicable to the federal judiciary as a whole, nor especially to the justices of the Supreme Court. During the past thirty years or so, these men have not hesitated to assert that they have the highest wisdom and hold the ultimate authority in such matters as school integration, racial balance, abortion, the prevention and punishment of capital crimes, reapportionment, and the treatment of the mentally ill and prison inmates.[12] All of these issues were regarded as altogether beyond either the jurisdiction or the competence of judges and courts: they were the proper and ordained domains of other experts and authorities. But in all of these contexts, the federal courts have intervened—"meddled"—to correct persistent and intolerable ills. I hold no strong brief for federal judges as arbiters of moral, social, economic, and other such problems: their reach often exceeds their grasp, and their discretion fails to match their valor. But these judges have, time after time, acted to repair gross injustices and initiate significant reforms.

So despite the reservations voiced above, I am sympathetic to Professor Miller's proposal and I am prepared to be optimistic that it might bear fine fruit. I would anticipate two great obstacles to this happy outcome. First, I do not see what measures—what "action"—the

11. *Id.* at 36.

12. Brown v. Bd. of Educ., 347 U.S. 483 (1954); Columbus Bd. of Educ. v. Penick, 443 U.S. 449 (1979); Roe v. Wade, 410 U.S. 113 (1973); Woodson v. North Carolina, 428 U.S. 280 (1960); Reynolds v. Sims, 377 U.S. 533 (1964); Wyatt v. Stickney, 344 F. Supp. 373 (1972), *aff'd in part sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (1974); Rhodes v. Chapman, 452 U.S. 337 (1981).

Supreme Court could mandate, aside from those that every administration has employed: to deal and to threaten. (Though I certainly acknowledge that several of these administrations, and especially the present one, could be a great deal more restrained, constructive, and cooperative in their dealings with the Soviets instead of treating them as avowed enemies.) Second, and more serious, is the fact that some of the parties—sovereign states—whose agreement is essential to nuclear disarmament, are altogether beyond not only the grasp, but even the reach, of the Supreme Court. Judges have encountered more than enough recalcitrance and open defiance from state legislatures and governors. It would be interesting to be hidden behind an arras, like some hero of a gothic romance, when some diplomat hands a Supreme Court writ to Yuri Andropov (Brezhnev's successor), Indira Ghandi, or Menachem Begin.

But any such event as this lies in a distant time and a different clime. And if it ever occurs, the writ will come from a court serving as the agent of a single world sovereign. For the foreseeable future, the Supreme Court will have to contend itself with enhancing public consciousness of the enormity of the threat and with putting incessant pressure on the other branches of government. On first acquaintance, Professor Miller's proposal does such violence to our political and legal presuppositions that it has the aura of the judicial equivalent of science fiction. But we all know how often the science fiction of one year is the technological fact of the next. And when I recall the changes that the federal courts have wrought in recent decades, I think that this may well be an idea whose time has come.